In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 533

RIFKIN TEXTILES CORP., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner imported bolts of a woven wool fabric having braid sewn over both selvaged [1] edges for the full length of the bolt. The Collector of Customs at the Port of New York classified the fabric under Item 336.50 of the Tariff Schedules of the United States (TSUS), 19 U.S.C. (1964 ed.) § 1202, as

[1] A selvage results from the weaving process and is the edge of a piece of woven fabric, of different construction from the body of the fabric, which keeps the fabric from unravelling or distorting.

"Other [woven fabrics, of wool, weighing over four ounces per square yard]: Valued not over $1.26⅔ per pound,"[2] with a rate of duty of 37.5 cents per pound plus 60% ad valorem. The petitioner challenged this classification in the Customs Court, contending that the merchandise should have been classified under Item 353.50, as "Ornamented fabrics," with a lower rate of duty of 42.5% ad valorem. "Ornamented" is defined in Headnote 3 of Schedule 3 (Textile Fibers and Textile Products) of the Tariff Schedules (so far as is relevant here) as "fabrics * * * which are ornamented with * * * braid."

The Customs Court, by a divided vote, decided that the merchandise in question was not an ornamented fabric. The Court of Customs and Patent Appeals unanimously affirmed.

2. The resolution by the courts below of the tariff classification question is correct and, in any event, does not warrant further review. Moreover, there is no merit to petitioner's claim that there was a denial of procedural due process.

a. The courts below correctly concluded, as had the Collector of Customs, that the merchandise in question did not come within the classification "ornamented fabrics." As both courts pointed out (Pet. App. A16-A19, A31-A33), the legislative history of Schedule 3 of the TSUS discloses that, to receive that classification, it is not enough that (as here) there is ornamentation attached to the selvages. Specifi-

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[2] It is agreed that Item 336.50 is the proper classification for the fabric unless it meets the requirements of Item 353.50.

cally, the explanatory notes to the Tariff Commission's Tariff Classification Study[3] state (Schedule 3, p. 7):

> Under the proposed definition of "ornamented", textile articles would no longer be assessed with rates of duty derived from paragraph 1529(a) on the basis of concealed, functionless pieces of braid, netting, etc. The rates derived from paragraph 1529(a) would apply only if such materials were used primarily for ornamentation.

Even more pointedly, the explanatory note to the Seventh Supplemental Report observes (p. 100):

> *Ornamented Fabrics.* The status of fabrics in the piece with a braid attached on the selvage is subject to a different test under this term than under the applicable existing tariff provision. The existing requirement that the article merely be "in part of" braid is less exacting. Under the new provision, the braid must in fact ornament the fabric in an acceptable trade sense. This would normally call for repetitive ornamentation throughout the length of the piece goods, not so affixed that it would in normal disposition be trimmed off or hidden.

With respect to the merchandise here involved, the courts below found that in normal disposition the selvages would be trimmed off or hidden. As it is undis-

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[3] The Study, as charged by seven Supplemental Reports, became the Tariff Schedules of the United States, with statutory status, see Pub. L. 87-456, May 24, 1962, 76 Stat. 72, as amended by Pub. L. 87-794, Oct. 11, 1962, 76 Stat. 882; 28 Fed. Reg. 8599, Aug. 17, 1963; Proc. No. 3548, Aug. 21, 1963, 28 Fed. Reg. 9279.

puted that no other part of the fabric is ornamented, the merchandise was properly classified.

b. Nor does petitioner's claim (Pet. 18-20) of procedural error present a question warranting review by this Court. With full awareness of the issue in the case and of the nature of the evidence which the United States intended to introduce, petitioner stated at two pre-trial conferences that its case in chief would be limited to the introduction into evidence of the fabric itself and dictionary definitions (R. 11-17, 25-28).[4] Its last statement concerning the limit of the proof it would introduce came at a pre-trial conference called specifically to discuss the problem of presentation of evidence. At trial, the court limited petitioner's case in chief to that encompassed within its own repeated pre-trial stipulation and accordingly excluded other proffered testimony relating to the trade meaning of the term "ornamented" (R. 46-47).[5] It rejected, as improper rebuttal, that portion of the proposed rebuttal testimony which was directed precisely at the main issue in the case, i.e., the meaning of the term "ornamented fabric," and thus should have been presented as part of the

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[4] "R" refers to the printed record on appeal in the Court of Customs and Patent Appeals.

[5] The statement by Judge Wilson—"You should reserve that for your rebuttal"—must be viewed in context as sustaining the objection based on the pre-trial agreement and as merely stating that the only way the evidence might come in, *if at all*, would be on rebuttal. No prejudice to petitioner resulted from the remark: the agreement and decision to limit the case in chief had already been made, and thus the remark did not lead petitioner into limiting his case in chief.

case in chief. We submit that this determination of the Customs Court was in basic accord with the pre-trial agreements of the parties and was clearly a matter for the trial court's discretion which does not warrant further review. In any event, the exclusion of the proffered testimony would, at most, be harmless error since, as we showed in part a *supra*, the history of this tariff provision makes it clear that the subject goods are not "ornamented fabrics."

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967

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